

11 USC § 503(b)
28 USC § 959

Gull Industries, Inc. v. Hanna Adv No 90-3388-S

In re Hanna Case No 390-33990-S11

4/7/92 DDS Unpublished

Gull sought an administrative claim for expenses incurred post petition to clean the water under it's property of petroleum that migrated from the debtor's property to Gull's neighboring property. The petroleum leaked from the tanks pre petition, but continued to migrate post petition. Gull contended that the trustee should have cleaned up the site in accordance with state law to prevent further migration. The trustee did not have adequate resources to clean up the site earlier, but did remove the gasoline tanks.

Gull was denied an administrative claim, and the trustee was ordered to clean up the estate property. The money spent by Gull did not reduce the amount the estate must pay to clean up it's property, so the expense was not necessary in preserving the estate. The migration of the petroleum was passive, and not within the scope of an administrative tort that is allowed priority under the code. The claim arose when the gasoline leaked from the tanks, so it is a pre petition unsecured claim to the extent provable.

AFFIRMED BY BAP 6/15/94 -

See P92-31A(33)

P92-9(8)

1 petroleum spill occurred on the debtor's land over a period
2 of time prior to the chapter 11 petition, Gull asserted that
3 it should be allowed an administrative expense for the
4 postpetition cleaning of subsurface groundwater under its
5 land because of continued migration of petroleum in the Hanna
6 soil to the Gull site. There is no claim that the debtor or
7 trustee added any significant new contamination to the Hanna
8 land postpetition. Rather, plaintiffs argued that Hanna's
9 chapter 11 trustee should have taken whatever measures were
10 necessary to stop the petroleum from further polluting the
11 groundwater.

12 Plaintiffs should be denied an administrative
13 expense. The trustee of the reorganization trust should be
14 ordered to continue the cleanup of the Hanna site in
15 accordance with the requirements of Oregon regulatory
16 authorities. The claim of Gull and BP should be allowed as
17 an unsecured general claim subject to such further
18 determinations as might be necessary in the claims process.
19 My reasons follow.

20 Daniel Hanna ("Hanna") filed a chapter 11 proceeding
21 on July 27, 1990, which filing eventually led to confirmation
22 of a plan of reorganization over a year later. Hanna
23 scheduled debts of over \$43,000,000. On July 30, 1990, the
24 court appointed John Mitchell, Inc. ("Mitchell") as the
25 chapter 11 trustee. On August 24, 1990, Gull and BP filed
26 the present action. Before Hanna filed chapter 11, Gull sold

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1 its land to BP and cleaned it up to meet environmental
2 standards imposed by the contract. Gull asserted and proved
3 at trial that contaminated subsurface water continued to
4 migrate to its land from the polluted Hanna land. As a
5 consequence, both Gull and BP asserted that their site failed
6 to meet environmental standards imposed by the sale contract
7 and by law. In other respects, plaintiffs have not shown
8 special harm beyond that shared in common with the public,
9 which is required to recover for a claim of private nuisance.

10 Before and after Hanna filed chapter 11, the Oregon
11 Department of Environmental Quality unsuccessfully requested
12 a site assessment from Hanna, and plaintiffs' counsel
13 unsuccessfully demanded that Hanna remedy the contamination.
14 By the end of October of 1990 Mitchell ceased operating the
15 filling station and emptied the tanks. Pursuant to a
16 stipulated order in December of 1990, the trustee agreed to
17 stop storing gasoline on the site and to complete initial
18 abatement measures and site studies required by Oregon
19 administrative regulations. To avoid the expense of further
20 testing of the tanks and lines, which under existing
21 regulations had to be replaced anyway, Mitchell removed the
22 tanks by mid-April of 1991 but did not comply with the
23 abatement and site study features of the December 1990 order.
24 The ground under the tanks was seriously contaminated by
25 gasoline.

26 Prior to Hanna's filing, plaintiffs installed at

1 least three large diameter ground water recovery wells on
2 their land. After the filing, they purchased, installed and
3 operated an air stripper to clean the subsurface water on
4 their land and incurred other related costs during the
5 administrative period. Plaintiffs' administrative priority
6 claim totalled about \$114,000. Plaintiffs' work did not
7 significantly contribute to any reduction of contamination on
8 Hanna's land.

9 At trial, Mitchell testified that he did not have any
10 money to finance a cleanup of the Hanna site during the
11 administrative period. He closed the operation to prevent
12 further contamination but could not divert money from other
13 sources without violating either the cash collateral order
14 with the Canadian Imperial Bank of Commerce or security
15 agreements with other secured creditors. He contended that
16 he acted as fast and as reasonably as he could under the
17 circumstances. He recognizes the estate's cleanup obligation
18 and is proceeding at this time to comply with regulatory
19 requirements. His testimony was not controverted.

20 At a pretrial conference early in the case on October
21 22, 1990, a suggestion was made that plaintiffs be authorized
22 to clean up the Hanna site in return for a lien. By that
23 time, it appeared that plaintiffs had probably already
24 incurred a major portion of the cost they now seek to recover
25 and the I.R.S. claimed a lien on this and other property. In
26 any event, testimony of plaintiffs' project manager strongly

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1 suggests that if Hanna's remediation costs approximated
2 Gull's remediation costs, it might have been cheaper to clean
3 up the Hanna site than to bear the cost of cleaning the
4 groundwater under plaintiffs' land. This question cannot be
5 answered until Mitchell completes the cleanup of the land.
6 Mitchell believes that the land is worth more than the cost
7 of cleanup.

8 Plaintiffs did not prove that they reduced the amount
9 the estate or its successors must pay to clean up the Hanna
10 property. The claim is not entitled to administrative status
11 under § 503(b), because plaintiffs' actions and expenses were
12 not necessary in preserving the estate. Burlington Northern
13 Railroad Co. v. Dant & Russell, Inc., (In re Dant & Russell,
14 Inc.), 853 F.2d 700, 706 (9th Cir. 1988).

15 The petroleum leaks on the Hanna property occurred
16 prepetition. The trustee acted reasonably under the
17 circumstances, and the estate should not be saddled with an
18 administrative expense for damages to a neighbor based on
19 inaction due to lack of money. The trustee's failure to stop
20 the prepetition petroleum spills from migrating was passive
21 and does not fall within the scope of liability entitled to
22 priority as an administrative tort under Reading Co. v.
23 Brown, 391 U.S. 471, 88 S. Ct. 1759, 20 L.Ed. 2d 751 (1968).
24 The trustee's inaction was not reckless or negligent, nor was
25 there any showing that he engaged in the abnormally dangerous
26 activities required to show that there was an administrative
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1 trespass. See, Restatement, Second, Torts § 165.

2 For bankruptcy purposes, the time at which a claim
3 arises depends on the debtor's conduct and not on the
4 subsequent chain of events leading to damage. In re Jensen,
5 127 Bankr. 27, 32 (Bankr. 9th Cir. 1991). Congress alone
6 fixes priorities. The State of Oregon cannot create an
7 administrative priority for bankruptcy purposes by enacting a
8 statute that imposes strict liability for the claims of a
9 neighbor arising from prepetition conduct of the debtor.
10 Dant & Russell, 853 F.2d at 709. Similarly, the laws of
11 physics do not transform prepetition conduct of the debtor
12 into a postpetition liability for damages without something
13 more than a showing that the trustee was passive. The
14 failure to clean up the property on the neighbor's timetable
15 also does not transform the prepetition claim into an
16 administrative liability to third parties as a failure to
17 comply with state law under 28 U.S.C. § 959 as interpreted in
18 Cal. State Board of Equalization v. Sierra Summit, 490 U.S.
19 844, 109 S. Ct. 2228, 104 L.Ed. 2d 910 (1989).

20 The reorganized debtor which now owns the property
21 must comply with state law and clean up the property. 28
22 U.S.C. § 959. Had the plaintiffs incurred costs which
23 cleaned the estate property, they would have been entitled to
24 an administrative expense for preserving property of the
25 estate. The damages they seek did little, if anything, to
26 reduce the expense of cleaning up the Hanna property. It is

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1 questionable how plaintiffs would be harmed more than anyone
2 else in Gresham if the petroleum on the Hanna site continued
3 to drip into the groundwater. The sale agreement between the
4 plaintiffs cannot be bootstrapped into justifying damages.
5 Plaintiffs did not have a well that was fouled by the
6 petroleum, or use the groundwater for any other purpose.
7 Plaintiffs' actions did not stop the source of the
8 contamination, and their expenses should not compete with the
9 limited funds available to actually clean the Hanna property.
10 It would indeed be bizarre if such damages could threaten the
11 financial ability of the trustee to satisfy his duty to the
12 public to clean up the property.

13 The record is not adequate to make a final ruling on
14 the amount of the unsecured claim. The trustee's original
15 counsel was only seeking a ruling on the priority of the
16 claim. During trial, the trustee's replacement counsel began
17 interjecting issues regarding the validity of the claim. As
18 a result, the briefing and argument on the liability issues
19 was fragmented and incomplete. After reviewing the authority
20 cited, it seems that CERCLA does not provide a basis for
21 plaintiffs' claims because petroleum is excepted from the
22 definition of a hazardous substance. 42 U.S.C. § 9601(14).
23 Plaintiffs do appear to have a general claim for damages
24 against the estate under O.R.S. 465.255 and 466.825 and
25 probably under the Oregon law of trespass as it is now
26 developing. However, I am not able to rule on the amount

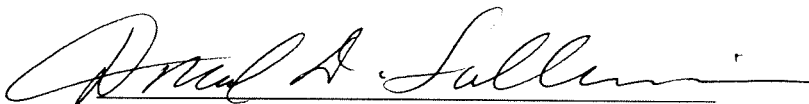
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1 recoverable under those theories or the defenses available on
2 the present record.

3 Plaintiffs are not entitled to administrative
4 priority for their claim. The amount of their claim is left
5 for the claims process. If plaintiffs wish to amend their
6 proof of claim, they should do so within twenty days of the
7 entry of the judgment in this case. The trustee must file
8 any objection to the amended claim or to claim number 501
9 within forty days of the entry of the judgment. The trustee
10 or his successor should proceed with the cleanup of the Hanna
11 property immediately.

12 A final judgment will be entered after the amount of
13 the claim has been determined.

14 DATED this 7th day of April, 1992.

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16 
17 DONAL D. SULLIVAN
Bankruptcy Judge

18 cc: Ronald T. Adams
19 John C. Cahalan
20 John Mitchell
21 Leon Simson
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